82-2070

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS,
Appellant,

v.

CHARLES F. MARSLAND, JR.,
in his capacity as
Prosecuting Attorney, City and
County of Honolulu,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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ISKCON HAWAII, INC.

QUESTIONS PRESENTED

1. Whether the Hawaii Supreme Court's interpretation and application of the Honolulu Comprehensive Zoning Code[1] (CZC) to absolutely prohibit more than five unrelated church members from occupying church premises as required in the practice of their religion, regardless of any compelling state interest and the possibility of accomodating Appellant's religious beliefs, violates the free exercise clause of the First Amendment as applied to the states by the Fourteenth Amendment?

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1. The principal sections interpreted and applied are Revised Ordinances of Honolulu (R.O.H.) §21-501(a) and §21-110, Definition of "Family", but see Statutory Provisions Involved, infra at p. 4.

2. Whether the Hawaii Supreme Court's interpretation and application of the Honolulu Comprehensive Zoning Code[1] (CZC) to prohibit Appellant from occupying its temple as required in the practice of its religion, without any consideration of the existence or purpose of a countervailing compelling state interest, violates the equal protection clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Hawaii are ISKCON Hawaii, Inc. (sued as International Society for Krishna Consciousness) and the Prosecuting Attorney, City & County of Honolulu, State of

Hawaii.[2] 28 U.S.C. §2403(b) may be applicable and Appellant is serving the Jurisdictional Statement on the Attorney General, State of Hawaii.

STATEMENT OF CORPORATE AFFILIATIONS

The International Society for Krishna Consciousness is a world-wide religion with separate local organizations in many states and countries. Appellant is an independent non-profit religious corporation, subject to spiritual guidance from the world-wide organization.

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2. Lloyd Fell was dismissed as a party in the trial court. (Appendix, hereinafter "App.", B and C.) John Doe defendants were never identified. However, the final order is addressed to "Defendant International Society for Krishna Consciousness and their agents, successors or assigns". (App. C.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

ISKCON Hawaii, Inc., appeals from the Judgment of the Supreme Court of Hawaii entered on March 21, 1983, which affirmed a decision of the First Circuit Court, State of Hawaii.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Hawaii is reported at 66 Haw. ___, 657 P.2d 1035 (1983)(App. A). Neither the decision of the First Circuit Court, State of Hawaii (App. B and D) nor of the District Court of the First Circuit, State of Hawaii[3] (App. E) are officially reported.

JURISDICTION

The proceeding below is an action by the Prosecuting Attorney, City & County of Honolulu, State of Hawaii, for a declaratory judgment interpreting the provisions of the Comprehen-

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3. The District Court case was a prior criminal prosecution for violation of the zoning ordinance at issue. Testimony from that case was admitted by stipulation in the instant action. Record on Appeal (R.) 88.

sive Zoning Code (CZC) of the City & County of Honolulu[4] to prohibit the occupation of church premises by more than five unrelated persons and for an injunction against Appellant enjoining it from occupying or causing the premises to be so occupied.

The opinion of the Supreme Court of Hawaii was rendered on February 1, 1983. The Judgment on Appeal and an Order Staying Mandate were entered on March 21, 1983. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Hawaii on March 29, 1983.

The appellate jurisdiction of the United States Supreme Court rests upon 28 U.S.C. §1257(2). The validity of an ordinance of the City &

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4. See footnote 1 and Statutory Provisions Involved, infra at p. 4.

County of Honolulu[4] is drawn into question as being repugnant to the First and Fourteenth Amendments of the United States Constitution and the decision of the Supreme Court of Hawaii was in favor of its validity.

STATUTORY PROVISIONS INVOLVED

The statutes, ordinances, and constitutional provisions at issue on appeal are: the First and Fourteenth Amendments to the United States Constitution (App. I) and Revised Ordinances of Honolulu §21-521, §21-511, §21-501(a) and (b) and §21-110 (definitions of "Family", "Dwelling, One Family", and "Dwelling Unit")[5] The ordinances are set out

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5. The Circuit Court, in applying the ordinance, limited itself to

[FOOTNOTE 5 CONTINUED ON NEXT PAGE.]

in pertinent part below. Penalties for violating the ordinances or the injunction are set out in R.O.H. §21-106 and H.R.S. §707-1077 (App. I). Other statutes and ordinances referred to are set out in Appendix I.

Revised Ordinances of Honolulu §21-521

Use Regulations.

All of the uses and structures permitted in the R-2 Residential district shall be permitted in the R-3 Residential district, except that detached guest houses and servants quarters shall not be allowed, as an accessory use or otherwise.

[CONTINUATION FOOTNOTE 5.]

finding that the occupancy limit of single family dwellings was exceeded and, ipso facto, Appellant was in violation of law. (App.D at p. 38-9.) The Hawaii Supreme Court did the same. (App.A at p. 10.)

Revised Ordinances of Honolulu §21-511

Use Regulations.

All of the uses and structures permitted in the R-1 Residential district shall be permitted in the R-2 Residential district, except that stables shall not be allowed, as an accessory use as otherwise.

Revised Ordinances of Honolulu §21-501(a)

Use Regulations.

Within an R-1 Residential district, only the following uses and structures shall be permitted:

(a) Principal uses and structures:

* * *

(2) Churches;

(3) Dwellings, one-family detached;

* * *

(b) Accessory uses and structures. Uses and structures which are customarily accessory and clearly incidental and subordinate to principal uses and structures, including:

(1) Detached guest house and servants quarters on lots containing not less than 1/2 acre in area;

(2) Stables for horses, provided that no stable shall be within 300 feet of any property line.

(3) Roomers may be accessory to a family composed of persons related by blood, adoption, or marriage, provided that such roomers may not exceed a total of three persons.

Revised Ordinances of Honolulu §21-110

Dwelling Unit. A 'dwelling unit' is a room or rooms connected together, constituting an independent housekeeping unit for a family, and containing a single kitchen.

Dwelling, One-Family. A 'one-family dwelling' is a building containing one dwelling unit. Mobile homes, travel trailers, housing mounted on self-propelling or drawn vehicles, tents or other forms of temporary or portable housing are not included within the definition.

* * *

Family. The term 'family' shall mean one or more persons, all related by blood, adoption, or marriage, occupying a dwelling unit or lodging

unit, provided that domestic servants employed only on the premises, may be housed on the premises and included as part of the family, provided further, that in lieu of the above family and domestic servants no more than five unrelated persons may occupy a dwelling or lodging unit. With reference to domestic servant it is the intent of the Council that where one member of the family of domestic servants is employed full time as a domestic servant, such domestic servant's spouse need not be employed full time as a domestic servant for the same employer.

STATEMENT OF THE CASE

In October 1974, Appellant ISKCON Hawaii, Inc., a religious society with worship derived from Hinduism, was granted land and buildings at 51 Coelho Way, Honolulu, Hawaii, to establish a temple of the Krishna faith. By means of this gift it was able to establish its first and only

temple in the State of Hawaii.[6]

The temple, originally designed as a dwelling, is located within an R-3 residential district which permits, among other uses, churches, community centers, universities, and public buildings as well as one-family detached dwellings. The temple buildings are located on 74,412 square feet of land, a lot over seven times the basic lot size for the district. (R.O.H. §21-520, App. I.)

In February 1978, the City & County of Honolulu formally began the legal

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6. The temple was personally blessed by the founder of the faith, A. C. Bhaktivedanta Swami, and thereby became a sacred place and destination of pilgrimage. "Deities" or sacred figures believed to embody divinities were installed and blessed and require the constant attendance of the devotees. (Transcript, Feb. 8, 1979, 21-3; Transcript, Dist.Ct., Oct. 25, 1978, 63-64.)

actions which are the subject of this appeal. A penal summons was issued alleging that Appellant "did occupy or cause to be occupied a two-story, wood-frame, single-family dwelling by more than five unrelated persons, thereby violating §21-521 of the Comprehensive Zoning Code, 1969, as amended." The case was tried in the District Court of the First Circuit, Honolulu Division, by the Honorable Russell K. Kono. His Findings of Fact and Conclusions (App. E), were, in pertinent part, as follows:

> Now, from the evidence, it is clear to this court that the defendants are engaged in a practice of a religious belief and that this is the kind of religion where it is essential that the devotees live as close together as possible with the guru in order to get that fullest benefit out of their religious beliefs.
>
> Now, the ordinance provides that churches can be built or can be utilized in a residential district;

> and I believe that the defendants are using the premises located at 51 Coelho Way as a church within the meaning of the ordinance.
>
> Therefore the court will enter judgment of acquittal for Defendants.

The acquittal was rendered on October 20, 1978.

On November 20, 1978, the Honolulu City Prosecutor filed the present civil action in the Circuit Court, First Circuit, State of Hawaii, for declaratory judgment and injunction pursuant to H.R.S. §603-23 seeking to enforce the Comprehensive Zoning Code (CZC) as interpreted by the City. The basis of the Complaint was that Appellant had allowed more than five unrelated persons to reside on the temple premises. In particular Appellant was charged with violating provisions limiting the occupany of a

single-family dwelling. (R.O.H. §21-501(a)(3) and §21-110 'Family'.)

Appellant asserted in its answer and amended answer that its conduct was protected by the First Amendment and that the City had the burden of showing a compelling governmental interest in order to apply the ordinance to its temple. (Record on Appeal, hereinafter R., 19 and 49, Twelfth Defense.) A Motion to Dismiss was filed on November 30, 1978, (R. 70) asserting, inter alia, that the Comprehensive Zoning Code as applied by the City infringed on Appellant's religious beliefs and practices and discriminated against Appellant's religion in violation of the First and Fourteenth Amendments to the United States Constitution. (R. 73, 82, 136-40.) After hearing

on February 8, 1979, the Circuit Court took the motion under advisement[7] and ordered the trial to go forward.

The parties stipulated that all testimony in the District Court would be received into evidence and that a judgment had been rendered by Judge Kono. (R. 88.) It was also stipulated that from October 1974, through the time of trial, there were at least ten unrelated[8] devotees occu

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7. The Court did not rule because it lacked the transcript of the District Court proceedings. (Transcript, Feb. 8, 1979, 15.) On the next court date, February 20, 1979, it denied the motion by issuing a permanent injunction prohibiting Appellant's occupancy. (App. C.)

8. The devotees are unrelated by the "family" ties specified by

[FOOTNOTE 8 CONTINUED ON NEXT PAGE.]

pying the temple. (T. Dec. 1, 1978, 2.)[9]

Dr. Cromwell Crawford, qualified as an expert in Hinduism and comparative religion, (T. D.Ct. 36-40)[9] testified that it was necessary in Appellant's religion for the devotees to live in the temple with their Guru (T. D.Ct. 43, 46, 66) and necessary for them to be available to serve the temple deities at all hours (T. D.Ct. 63-4). He described the mandate of living in

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[CONTINUATION FOOTNOTE 8.]

the ordinance. However, Dr. Cromwell Crawford, professor of comparative religion, testified that the relationship between devotee and religious teacher is closer than an adoption and the Guru is like a father to his pupils. (T. D.Ct. 44-5.)

9. T. = Transcript; T. D.Ct. = Transcript of District Court, October 25, 1978, admitted in evidence as Defendant's Exhibit S.

the temple as a centuries' old Hindu religious belief and practice. (T. D.Ct. 50.) Portions of Vedic scripture enjoining the devotee to reside with his Guru in their place of worship were admitted in evidence. (Defendant's Exhibit D.)

Dr. Crawford further testified that devotees should, according to the tenets of their religion, sleep and rest in the temple in order to maintain unbroken Krishna consciousness. (T. D.Ct. 47, 50.) To be in such a holy place during periods of rest, to be able, upon awakening, to immediately view the sacred temple architecture and deities, (T. D.Ct. 61, 64) to be exposed to the total exemplary mode of living of the Guru (T. D.Ct. 55, 71) and to be constantly available for service of the Guru

and deities (T. D.Ct. 61-4) -- all these are essential to the attainment and maintenance of religious enlightenment. According to Dr. Crawford's testimony, without living in the temple with the Guru, the devotee "cannot succeed". (T. D.Ct. 43.)

Matthew Whitmore, then president of the temple, testified that all celibate devotees were required by their faith to live in the temple in the service of their living Guru and those living apart are considered "fallen". (T. Feb. 8, 1979, 19-20; 51-52.)

Following all the testimony, Circuit Court Judge James Burns adopted the findings of Judge Kono with respect to a church use of the premises (App. D at p. 36 and App. B, paragraph 8). But he then held as a

matter of law (App. B, paragraph 9):

> Restrictions placed on the number of occupants of single-family dwellings by the CZC also apply to churches.

Based upon the stipulated fact that more than five unrelated persons occupied the temple (App. B, paragraph 4), an injunction was issued on March 16, 1979. (App. C.) Judge Burns stated that his ruling was based solely upon the number of persons on the premises without regard to any possible governmental interest that might be served by such a prohibition. (App. D at p. 39-40.)

On March 23, 1979, Appellant appealed to the Supreme Court of Hawaii. (R. 205.) Two of the three questions presented on appeal challenged the unconstitutional interpretation and application of the zoning

ordinance to Appellant in violation of its First Amendment free exercise of religion and in discrimination against its religious beliefs and practices. (Opening Brief of Defendant-Appellant, pp. 2-4 and 41-42.) The issues were extensively briefed by both parties. (In addition to Opening Brief, Answering Brief of Plaintiff-Appellee, pp. 21-27 and Reply Brief of Defendant-Appellant pp. 11-20.)

The Hawaii Supreme Court, in its opinion of February 1, 1983, found that Appellant is a church and that the occupation of the premises, prohibited by the injunction, is in the practice of their religion (App. A at p. 7-8, 9):

> It qualifies as a church within the meaning of the ordinance because it is regularly and predominantly used as a place for public worship.

* * *

> It is undisputed that in excess of five unrelated Krishna devotees have resided on the premises in the practice of their religion.

The Hawaii Supreme Court acknowledged that ". . . the living together of devotees with their Guru (even though their Guru is only with them in spirit)[10] is a necessary part of the practice of the Krishna religion." (App. A at p. 10.) The Court nevertheless went on to hold (App. A at p. 10):

> When the structures on the premises are thus used as a residence, the pertinent provisions of the CZC become applicable.

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10. The Supreme Court overlooked or omitted mention of testimony that the devotees serve a physically present Guru who lives in the temple. (T. D.Ct. 54 and T. Feb. 8, 1979, 47-8.)

The Hawaii Supreme Court held that "the District Court erred in its interpretation and application of the provisions of the CZC" (App. A at p. 17) and the Circuit Court properly enjoined Appellant from occupying their temple. The Supreme Court also held that the ordinance did not unconstitutionally discriminate against Appellant. (App. A, fn. 2.)

THE QUESTION IS SUBSTANTIAL

1. THE DECISION OF THE HAWAII SUPREME COURT CONFLICTS WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

As interpreted and applied by the Hawaii Supreme Court, all consideration of the conflict between Appellant's religious worship and the terms of the Comprehensive Zoning Code ended with a finding that a

certain number of Krishna devotees occupied the premises. Upon such a finding Appellant was deemed to be in violation of the ordinance and subject to all its penalties and intrusive consequences.

Appellant was originally prosecuted for violation of the zoning ordinance and the District Court found (App. E at p. 45) the church protected from criminal prosecution because:

> . . . [T]his is the kind of religion where it is essential that the devotees live as close together as possible with the Guru in order to get that fullest benefit out of their religious belief.

The Hawaii Supreme Court, subsequently held that the District Court "erred in its interpretation and application"[11] of the zoning code and

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11. In discussing the res judicata

[FOOTNOTE 11 CONTINUED ON NEXT PAGE.]

that when ISKCON devotees so lived together with their Guru, ". . . ISKCON was clearly in violation of the ordinance." (App. A at p. 10.) As a result of such re-interpretation and application Appellant is subjected to the alternative of incurring civil and/or criminal penalties or abandoning the tenets and age-old practices of their religion. (R.O.H. §21-106, H.R.S. §707-1077 in App. I.)

In its prior decisions this Court has recognized that an interference

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[CONTINUATION FOOTNOTE 11.]

> and collateral estoppel argument the Hawaii Supreme Court stressed that it was not re-litigating the findings of the District Court, but simply re-interpreting the law. (App. A at p. 15-17.) As so interpreted the simple occupancy by more than five unrelated persons automatically constituted a violation.

with free exercise of religion can only be justified by a compelling state interest and then only if "the least restrictive means of achieving" that interest are utilized. Sherbert v. Verner, 374 U.S. 398 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thomas v. Review Board Indiana Employment Security Division, 450 U.S. 707 (1981).

In addition, in arriving at a determination of the constitutionality of the statute, the court must weigh the magnitude of the impact upon the party's exercise of religion and the extent to which an accomodation is possible between the free exercise of religion and any state interest. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1982); United States v.

Lee, 455 U.S. 252 (1982).

Even an indirect burden, as where a governmental benefit is conditioned upon modification of a religious practice, has been held to be an infringement on free exercise, Thomas v. Review Board Indiana Employment Security Division, 450 U.S. 707, 717-8 (1981):

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

In the present case the burden is not indirect, but direct, since the continuance of conduct mandated by religious belief exposes Appellant to civil penalties as well as to potential fine and imprisonment. (R.O.H.

§21-106 and H.R.S. §707-1077.)

Not only must the state refrain from imposing a penalty for the exercise of religious belief and practices, but in order to intrude at all the government must offer some compelling state interest which overrides the other party's constitutional freedom. As stated in Sherbert v. Verner, 374 U.S. 398, 406 (1963):

> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," . . . Thomas v. Collins, 323 U.S. 516, 530.

No such abuse or danger has been

advanced in the present case.

Even if a compelling state interest were advanced, it would have been necessary to show that the statutory scheme constituted the "least restrictive means" of advancing state interests and that no alternative regulations or exemptions were feasible. Thomas v. Review Board Indiana Employment Security Division, 450 U.S. 707, 718 (1981) and Sherbert v. Verner, 374 U.S. 398, 407 (1963).

2. THE CASE REPRESENTS A POTENTIALLY RECURRING CONFLICT BETWEEN STATE AND CHURCH AND IS OF CONCERN TO OTHER CHURCHES AND CIVIL LIBERTARIANS.

This case involves the interpretation and application of an ordinance of the City & County of Honolulu, a large metropolitan area and the largest city in the state. It is

enforceable by the Prosecuting Attorney and carries both criminal and civil sanctions. (R.O.H. §21-106; H.R.S. §707-1077.) Given Hawaii's multi ethnic community and long history of immigration the interpretation and application of the ordinance poses unique Constitutional problems. As argued by the Hawaii Council of Churches in an amicus curiae brief filed herein in the lower court:

> Nowhere in the United States is this diversity of religious bodies as apparent as it is in the State of Hawaii.

The Hawaii Council of Churches and the American Civil Liberties Union of Hawaii filed friend of court briefs. The Hawaii Council of Churches stated some of its concerns as follows (Defendant's Exhibit G):

> We are deeply concerned about what appears to be a selective and arbitrary application of law directed at one of the less popular religions in Hawaii. If this provision of the Comprehensive Zoning Code were applied equally to all religious bodies it would have drastic effect upon a large number of religious bodies whose functioning includes retreats, hospitality houses, service centers and camps.

The American Civil Liberties Union concluded (Defendant's Exhibit F):

> It is the belief of the ACLU that the governmental action in this case jeopardizes the First Amendment rights of all residents of the State of Hawaii.

The threat posed is underscored by the re-interpretation of the zoning ordinance to again make Appellant's religious practice a criminal offense. As pointed out by the Hawaii Council of Churches the application not only has ramifications for virtually all of Hawaii's "traditional churches", but results in selective

governmental discrimination against that minority of religions which have religious beliefs and practices similar to Appellant.

3. THE HAWAII SUPREME COURT DECISION CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS AND OF OTHER CIRCUIT COURTS.

The United States Court of Appeals for the Ninth Circuit, in accordance with prior decisions of the United States Supreme Court, has recognized that the government must put forward a compelling state interest to justify interference with religious freedom, must adopt the least restrictive means of regulation, and must consider the practicability of an accomodation of Appellant's religious beliefs by the granting of an exemption. In E.E.O.C. v. Pacific Press Publishing

Association, 676 F.2d 1272, 1279 (1982), the Ninth Circuit citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963) set forth a three-part balancing test:

> . . .
> In determining whether a neutrally based statute violates the free exercise clause, courts must weigh three factors:
>
> > (1) The magnitude of the statute's impact upon the exercise of the religious belief,
> >
> > (2) The existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and
> >
> > (3) The extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

In Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir.1980), citing Wisconsin v. Yoder, 406 U.S. 205 (1972), and

Cantwell v. Connecticut, 310 U.S. 296 (1940), the Ninth Circuit said:

> Government regulations which infringe protected religious practice are proscribed by the free exercise clause of the First Amendment unless the government can demonstrate that the regulation is the least restrictive alternative to meet a compelling state need.

Even in the case of prisoners, whose rights are severely restricted, the government must demonstrate a compelling interest and justify the restrictiveness of the regulation. Kennedy v. Meacham, 540 F.2d 1057, 1061 (10th Cir. 1976); Native American Council of Tribes v. Solem, 691 F.2d 382, 385 (8th Cir. 1982); and Barrett v. Commonwealth of Virginia, 689 F.2d 498, 502 (4th Cir. 1982).

The Circuit Court and the Hawaii Supreme Court failed to weigh any of the above factors, holding that

violation of the occupancy limits of a single-family dwelling could automatically be transferred to churches.

4. THE CASE IS IMPORTANT BECAUSE NUMEROUS CITIES HAVE SIMILAR "RULE OF FIVE" ZONING ORDINANCES AND SUCH ORDINANCES MUST NOT BE ALLOWED TO OVERRIDE FUNDAMENTAL CONSTITUTIONAL FREEDOMS.

The "rule of five" zoning ordinance whose interpretation and application is challenged in this case has been adopted by numerous cities across the United States. Moore v. East Cleveland, 431 U.S. 494, 495-6 (1977), Annot., Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together In Residential Zone, 12 A.L.R.4th 238 (1980). Where there is no conflict with fundamental constitutional freedoms, such ordinances have been upheld by prior decisions of this Court. Indeed, the

Hawaii Supreme Court quoted the case of Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) as support for its decision in the instant case. (App. A at fn. 2.) In so doing, the Hawaii Supreme Court overlooked what should be an important distinction between that case and the present case of religious freedom. The Village of Belle Terre ordinance was upheld because the Court found Appellee's claim raised "no 'fundamental' right guaranteed by the Constitution." Village of Belle Terre v. Boraas, supra, at 8. By contrast the free exercise of religion is one of the most fundamental of all constitutional rights, Chaplinsky v. New Hampshire, 315 U.S. 568, 570-1 (1942); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Abood v. Detroit

Board of Education, 431 U.S. 209, 235 (1977), and in such a case the justification and effects of the ordinance must be carefully scrutinized. Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

CONCLUSION

The decision of the Hawaii Supreme Court should be summarily reversed in light of the prior decisions of this Court. The rigid interpretation given the zoning ordinance automatically excludes consideration of the fundamental religious freedoms protected by the First Amendment. The Hawaii Supreme Court failed to consider what compelling governmental interest, if any, might be served by the ordinance and the relation between any alleged state interest and

the prohibitions of the law. It failed to weigh the magnitude of impact on Appellant's worship, to scrutinize the means employed by the government, or to evaluate the ability to accomodate Appellant's exercise of religion by appropriate exemption[12] or less restrictive regulation.

The question posed is an important one. Many major municipalities have similar zoning ordinances and their enforcement against a church, as in the instant case, poses a serious conflict between church and state. Church members are faced with the

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12. It is noteworthy that the ordinance (R.O.H. §21-110, 'Family') contains a specific exemption for domestic servants and their spouses, yet the lower courts did not see fit to consider any possible exemption for worshippers of a recognized church.

choice of abandoning their devotional practices, compromising their religious beliefs, or incurring legal penalties. The resolution of this conflict adopted by the lower courts directly contradicts and by-passes a long history of First Amendment case law.

Probable jurisdiction should be noted and the judgment below reversed.

DATED: Honolulu, Hawaii, June 15th, 1983.

Respectfully submitted,

By _____

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Attorney for Appellant

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF HAWAII
OCTOBER TERM 1982

CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii, Plaintiff-State of Hawaii, Plaintiff-Appellee, v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, Defendant-Appellant and LLOYD FELL and JOHN DOES, Defendants.
NO. 7350
APPEAL FROM FIRST CIRCUIT COURT
HONORABLE JAMES S. BURNS, JUDGE
CIVIL NO. 56267
FEBRUARY 1, 1983
LUM, ACTING C.J., NAKAMURA, JJ., RETIRED JUSTICES OGATA AND MENOR, ASSIGNED TEMPORARILY*

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*Chief Justice Richardson, who heard oral argument in this case, retired from the court on December 30, 1982. HRS § 602-10 (1979 Supp.) provides: "After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice."

Syllabus by the Court

1. A structure qualifies as a church under the City and County of Honolulu Comprehensive Zoning Code if it is regularly and predominantly used as a place of public worship.

2. A residence, in the context of the City and County of Honolulu Comprehensive Zoning Code, means a dwelling or structure where people live.

3. Although the Comprehensive Zoning Code permits the utilization of a structure for religious worship, if the structure is also used as residence, the provisions of the code limiting the number of unrelated persons who may live in one building is nevertheless applicable.

4. The doctrine of res judicata

basically provides that the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

5. Collateral estoppel is an aspect of res judicata which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies.

6. The determination of a question

of law by a judgment in an action is not conclusive between parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other parties.

7. Dismissal or acquittal of a criminal charge will not necessarily bar an action for an injunction to prevent further violations, even where the petition for the injunction is founded upon the same alleged violation that motiviated the prior criminal prosecution.

Per Curiam. This is an action for injunctive relief and for declaratory judgment brought by Togo Nakagawa,[1] as prosecuting attorney for the City and County of Honolulu, seeking to enjoin the International Society for Krishna Consciousness ("ISKCON") from allowing more than five unrelated persons to occupy the residential premises at 51 Coelho Way, City and County of Honolulu. The trial court granted the injunctive relief prayed for and entered declaratory judgment against ISKCON. The Society appeals.

ISKCON points out that the owner of the land and buildings at 51 Coelho Way in Nuuanu had in October, 1974,

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1. On June 24, 1981, this court granted the motion to substitute Charles F. Marsland, Jr., prosecuting attorney, for Togo Nakagawa, former prosecuting attorney, as plaintiff-appellee.

granted to the society and its members for the nominal sum of $1.00 per year the right to use the building and premises indefinitely, as a temple, in pursuance of the Krishna faith. The area is comprised of 74,412 square feet of cultivated grounds and is very much larger in size than most of the lots in the area. On the premises are the main two-story residential building and several other smaller structures, such as a maid's quarters and a guest house. In the two-story building are five bedrooms and two baths on the second floor. ISKCON points out that by this grant the society was able to establish for the first time a temple in Hawaii.

I

Ordinance No. 3234, the City and

County of Honolulu Comprehensive Zoning Code, as amended, ("CZC") does allow for the existence of a church in the R-3 Residential District where the Krishna "temple" is situated, but the prosecution argues, in effect, that where a church is also being used as a dwelling, then the provisions of the CZC restricting residency to not more than five unrelated persons must be applied. We agree.

Among the permissible uses and structures in an R-3 Residential District are churches and one-family detached dwellings. The subject two-story structure was originally designed and built as a one-family dwelling. It is now being used, however, as both a church and a place of residence. It qualifies as a church within the meaning of the

ordinance because it is regularly and predominantly used as a place for public worship. See Annot., 62 A.L.R.3d 197 (1975). Webster's Third New International Dictionary 404 (1957) also defines "church" to mean, inter alia, "a place of worship of any religion." ISKCON's daily schedule in the use of the building and premises essentially includes religious ceremonies, prayers, and lectures. The Krishnas also hold a feast on Sundays, to which the public is invited, as part of "the policy that is established around the Krishna movement." These activities are consistent with the use of structural premises as a place of religious worship.

A "residence" has been defined to mean a dwelling or structure where

people live, Murdock v. City of Norwood, 67 N.E.2d 867 (Ohio, 1946), and Matthew R. Whitmore, president and spiritual counselor of the "temple," explains the general use of the subject premises as a residence as follows:

> [T]he main purpose of the temple is to give people the opportunity to understand about Krishna Consciousness. So sense [sic] it's a Center for Krishna Consciousness[.] [sic] [W]e have many people coming to the temple who don't have previous contact with Krishna Consciousness but who are interested in Krishna Consciousness. And so we invite them to stay with us and learn about Krishna Consciousness. . . . They live with us, live the life style. And they go through the whole life style that we have, the whole way we live. . . [w]hich includes sleeping with us. [Emphasis added.]

It is undisputed that in excess of five unrelated Krishna devotees have resided on the premises in the practice of their religion. On February 8, 1979, for example, there were

approximately thirty members living on the premises, more than five of whom were unrelated to each other. ISKCON explains that the living together of devotees with their Guru (even though their Guru is only with them in spirit) is a necessary part of the practice of the Krishna religion. When the structures on the premises are thus used as a residence, the pertinent provisions of the CZC become applicable. And when so applied, ISKCON was clearly in violation of the ordinance.

A "one-family dwelling" is defined as "a building containing one dwelling unit." CZC §21-110. Only a family may reside in a one-family dwelling and the term "family" means:

> [O]ne or more persons, all related by blood, adoption, or marriage, occupying a dwelling unit or lodging unit, provided that domestic

servants employed only on the premises, may be housed on the premises and included as part of the family, provided further, that in lieu of the above family and domestic servants no more than five unrelated persons may occupy a dwelling or lodging unit. . . . [CZC § 21-110][Emphasis added.]

II

The more troublesome question is whether res judicata and collateral estoppel interpose a bar to the present action for injunctive relief and for declaratory judgment.

The facts which give rise to this particular issue are as follows: On February 2, 1978, ISKCON was charged in the district court of the first circuit with having violated the

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2. Such a classification was held to be valid in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Compare City of Santa Barbara v. Adamson, 27 Cal.3d 123, 610 P.2d 436 (1980); State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

provisions of Section 21-521 of the CZC, 1969, as amended, in that "it did occupy or did cause to be occupied a two-story wood frame single-family dwelling by more than five unrelated persons on or about the 12th day of October 1976." The district court found ISKCON not guilty, holding that the structure was a church within the meaning of the ordinance and the "rule-of-five" did not, therefore, apply.

Subsequently, on November 20, 1978, the present action for injunctive relief and for declaratory judgment was filed in the circuit court.[3] The

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3. The CZC provided two ways for the enforcement of its provisions. Section 21-106 of the CZC provided:

Violations and Penalties.

[FOOTNOTE 3 CONTINUED ON NEXT PAGE.]

circuit court also found the subject structure to be a church, but held that the occupation of the building by more than five unrelated individuals was not permissible under the ordinance.

ISKCON argues, in effect, that inasmuch as the district court had entered a final judgment of acquittal

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[CONTINUATION FOOTNOTE 3.]

(a) The City may maintain an action for an injunction to restrain any violation of the provisions of this Chapter and may take any other lawful action to prevent or remedy any violation.

(b) Any person violating any provision of this Chapter shall upon conviction, be punished by a fine not exceeding $1,000 or by imprisonment not exceeding thirty days, or by both such fine and imprisonment. The continuance of any such violation after conviction shall be deemed a new offense for each day of such continuance.

in its favor on the penal charge of allowing more than five unrelated persons to occupy the subject structure at 51 Coelho Way, the issue of whether or not, on essentially the same facts, it was in violation of the ordinance could not be relitigated in a second action in the same or a different court. ISKCON, in other words, is seeking to interpose in the present case the doctrines of double jeopardy, res judicata, and collateral estoppel.

In Ellis v. Crockett, 51 Haw. 45, 55-56, 451 P.2d 814, 822-823 (1969), this court defined res judicata and collateral estoppel as follows:

> The doctrine of res judicata basically provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not

only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided."

Collateral estoppel is an aspect of res judicata which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies. Collateral estoppel also precludes relitigation of facts or issues previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue. [Citations omitted.]

Clearly, ISKCON could not again be personally charged on essentially the same facts for the violation of the ordinance. Double jeopardy would constitute a bar to the second prosecution. Cf. Ashe v. Swenson, 397 U.S. 436 (1970). We do not, however, have that situation before us. The diametrically conflicting conclusions

drawn by the district court and the circuit court turned upon their respective interpretations of the applicable provisions of the CZC. ISKCON's acquittal in district court and the circuit court turned upon their respective interpretations of the applicable provisions of the CZC. ISKCON's acquittal in district court rested upon that court's determination of a question of law. In that regard we find the following statement of the rule in the Restatement of the Law (Second) Judgments § 28 (1980) to be particularly apropos:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> * * *

> (2) The issue is one of law and . . . a new determination is warranted . . . to avoid inequitable administration of the laws. . . .

The Restatement then goes on to point out in comment c that a reexamination of the rule of law is appropriate in circumstances where "preclusion would result in a manifestly inequitable administration of the laws."

We have made it clear in this opinion that the district court erred in its interpretation and application of the provisions of the CZC. In applying the doctrine of res judicata as ISKCON would have us to do, we would be permitting it to continue to violate the ordinance without fear of governmental sanctions while at the same time warning other parties that the same ordinance would be enforced

against them. This would be an absurd and unreasonable application of the doctrine. The injunction against ISKCON is not a penalty for its past violations of the ordinance. It simply enjoins ISKCON from further violating the applicable provisions of the CZC.

Moreover, it has been held (and we think properly so) that dismissal or acquittal on a criminal charge will not necessarily bar an action for an injunction to prevent further violations, even where the petition for the injunction is founded upon the same alleged violation that motivated the prior criminal prosecution. Thus, in City of New Orleans v. Lafon, 61 So.2d 270 (La.App. 1952), the Louisiana appellate court held that an injunction may issue even if the

defendant had previously been acquitted in a criminal prosecution for allegedly violating a zoning ordinance. In Lafon the defendant was operating a trailer court which the City of New Orleans claimed was a violation of its zoning law. In upholding the right of the City to apply for an injunction even after the defendant's acquittal on the criminal charge, the court observed:

> There are two divergent views on the question of whether the violation of a criminal statute gives rise to the right to enjoin, but under both views it is felt that, where there is involved a property right which would not be adequately protected by criminal prosecution, the right to injunction vests regardless of whether there may also be a criminal prosecution. [61 So.2d at 273.]

The Louisiana court pointed out that the rights of other property owners in the zoning district where the violations occurred must necessarily

be considered. Only by an injunction could these property rights be protected and the objectives of the ordinance promoted.

Other courts have similarly held that an acquittal in a criminal prosecution for violation of a zoning ordinance is not res judicata in a civil proceeding for the enforcement of the zoning ordinance. See Town of Natick v. Sostillo, 358 Mass. 342, 264 N.E.2d 664 (1970); Blackmon v. Richmond County, 224 Ga. 387, 162 S.E.2d 436 (1968); City of Girard v. Girard Egg Corp., 87 Ill.App.2d 74, 230 N.E.2d 294 (1967).

Affirmed.[4]

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4. We find the other specifications of error, in the factual circumstances of this case, to be without merit.

H. LUM
EDWARD H. NAKAMURA
THOMAS S. OGATA
BENJAMIN MENOR

Filed February 1, 1983

APPENDIX B

Of Counsel:
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Attorney for Defendant
International Society for
Krishna Consciousness

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAII

TOGO NAKAGAWA, in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii, Plaintiff, vs. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS; LLOYD C.	Civil No. 56267 FINDINGS OF FACT; CONCLUSIONS OF LAW

FELL; AND JOHN DOES,

Defendants.

FINDINGS OF FACT; CONCLUSIONS OF LAW

The above entitled matter having come on for hearing on December 1 and 27, 1978, and February 8 and 20, 1979, before the Honorable James S. Burns, and the Plaintiff having been represented by Roland L. H. Nip and the Defendant International Society for Krishna Consciousness having been represented by John F. Schweigert, and the Court having considered all exhibits, pleadings, evidence and memoranda presented at said hearings and having heard argument by all counsel, and the Court being satisfied that the Plaintiff's prayer for Preliminary and Permanent Mandatory Injunction be granted, the Court

hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action for a Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment restraining and enjoining Defendants from allowing more than 5 unrelated persons to occupy the dwelling unit at 51 Coelho Way, City and County of Honolulu, designated by Tax Map Key 1-8-6: 38 portion, hereinafter referred to as "the property," in violation of City and County of Honolulu Ordinance 3234, as amended, hereinafter referred to as the CZC (Comprehensive Zoning Code); and to declare that the occupation of the property by more than five unrelated persons violates the CZC.

2. Defendant International Society

for Krishna Consciousness (hereinafter "ISKCON") is in possession of the property.

3. The property is within a zone designated as "R-3" by the CZC.

4. Since at least October 12, 1976, Defendant ISKCON has occupied or caused to be occupied the building structure at 51 Coelho Way by more than five unrelated persons.

CONCLUSIONS OF LAW

1. This Court has proper jurisdiction over the above entitled matter.

2. This Court has no jurisdiction over Defendant Lloyd C. Fell

3. The present matter is not barred by res judicata, collateral estoppel, double jeopardy, laches, or waiver.

4. The Complaint properly states a claim upon which relief can be granted.

5. The present matter is not barred by the statute of limitations.

6. The CZC applies to the above entitled matter.

7. The occupation of the subject property by more than five unrelated persons is not a permitted accessory use for an R-3 Residential District under Sections 21-521 and 21-501(b) of the CZC.

8. The structure at 51 Coelho Way is a church within the meaning of the CZC.

9. Restrictions placed on the number of occupants of single-family detached dwellings by the CZC also apply to churches.

10. An establishment of violation of the CZC entitled Plaintiff to relief from violation of the CZC by this Court regardless whether Plain-

tiff has sustained an irreparable harm.

11. Plaintiff has proven a violation of Sections 21-521 and 21-501(b)(3) of the CZC by Defendant ISKCON.

12. Plaintiff is therefore entitled to an order granting a Permanent Mandatory Injunction and a Declaratory Judgment against Defendant ISKCON. Defendant Lloyd C. Fell is entitled to an order dismissing Plaintiff's Complaint as to him.

DATED: Honolulu, Hawaii, March 16, 1979.

//s// JAMES S. BURNS
Judge of the Above Entitled Court

APPROVED AS TO FORM:

//s// ROLAND L. H. NIP
TOGO NAKAGAWA
Prosecuting Attorney
1164 Bishop Street
Honolulu, Hawaii 96813

FILED MARCH 16, 1979

APPENDIX "C"

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Attorney for Defendants

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAII

TOGO NAKAGAWA, in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii, Plaintiff, vs. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS; LLOYD C.	Civil No. 56267 ORDER GRANTING PERMANENT MANDATORY INJUCTION AS TO DEFENDANT ISKCON

FELL; AND JOHN DOES,

Defendants.

ORDER GRANTING PERMANENT MANDATORY INJUNCTION AS TO DEFENDANT ISKCON

The above captioned complaint for Injunctive Relief having duly come on for hearing on December 1 and 27, 1978, and February 8 and 20, 1979, before the Honorable James S. Burns, Judge of the above entitled court, at which hearing the Plaintiff Togo Nakagawa was represented by Roland L. H. Nip, and Defendant International Society for Krishna Consciousness was represented by John F. Schweigert, Esq., and the Court having reviewed the pleadings and having considered all the evidence and memoranda presented at said hearings and having heard arguments of all counsels, and

the Court being satisfied that the Plaintiff's prayer for a Permanent Injunction be granted as to Defendant International Society for Krishna Consciousness,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff's prayer for a Permanent Injunction be granted as to Defendant International Society for Krishna Consciousness and denied as to Defendant Lloyd C. Fell.

2. That Defendant International Society for Krishna Consciousness and their agents, successors, or assigns cease to occupy or cause to be occupied the property at 51 Coelho Way by more than five unrelated persons until such time as the property is rezoned pursuant to law so as to allow such activity.

DATED: Honolulu, Hawaii, March 16, 1979.

//s// JAMES S. BURNS
Judge of the Above Entitled Court

APPROVED AS TO FORM:

//s// ROLAND L. H. NIP
TOGO NAKAGAWA
Prosecuting Attorney
1164 Bishop Street
Honolulu, Hawaii 96813

FILED MARCH 16, 1979

APPENDIX "D"

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAII

TOGO NAKAGAWA, in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii,	)	
Plaintiff,	)	CIVIL NO. 56267
vs.	)	
INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS; LLOYD C. FELL; AND JOHN DOES,	)	
Defendants.	)	

T R A N S C R I P T

Proceedings heard before the Honorable James S. Burns, Second Judge, Presiding, on Tuesday, February 20, 1979.

APPEARANCES:

ROLAND L. H. NIP, ESQ.,
Deputy Pros. Attorney
For the State of Hawaii

JOHN SCHWEIGERT, ESQ.,
Attorney
For the Defendants.

(The Court convened at 1:00 p.m.)

(The Clerk called the case.)

MR. NIP: Good afternoon, Ronald Nip for the Plaintiff.

MR. SCHWEIGERT: John Schweigert appearing on behalf of the Defendants.

THE COURT: Good afternoon. I have in my hand, the famous transcript. How would you like it into this case, somebody's evidence?

MR. SCHWEIGERT: I think it would be defendants' . . . actually it's by stipulation of parties so its already by stipulation.

THE COURT: Okay. Should we give it

a number? It's by stipulation by whom?

MR. SCHWEIGERT: Actually it should be defendants' Exhibit S.

THE COURT: Is that agreeable, Mr. Nip?

MR. NIP: Yes, your Honor.

THE COURT: Okay.

(The transcript referred to above was received and marked Defendants' Exhibit S in evidence.)

THE COURT: Now, we have all the evidence into the record. I guess it's speech making time if you so desire.

(Arguments by both Counsel.)

THE COURT: First of all, the Court finds it has jurisdiction over the issues in this case. The parties have stipulated; even if they hadn't, the evidence indicates that the property in question is subject to

the R-3 Residential District Restrictions as contained in the Comprehensive Zoning Code of the City and County of Honolulu.

And looking at the CZC that applies to R-3, all the uses and structures that are permitted in R-2 shall be permitted in R-3. For R-2 Residential District, it says all the uses and structures permitted in R-1 shall be permitted in R-2. So we are back down to R-1. What is permitted in R-1? The Comprehensive Zoning Code indicates that within R-1 you may have churches and you may have dwellings, one-family detached.

I gather from reading the transcript of Judge Kono's proceedings that he concluded that a church would not have to comply with the requirement that dwellings be one-family

detached. I don't know if that's true and I'm not making that a finding but quoting from Page 5 of the transcript, the Court indicated: "If it's a church, then clearly the case will be dismissed. If it's not a church, then we can go into the fact of whether or not people can live there."

So I assume that Judge Kono was operating on the premises that churches don't have to comply to the restrictions on dwellings.

Now, Judge Kono held the defendant in this case is a church and this Court has no reason to disagree, so this Court will find that the defendant is classifiable as a church within the meaning of the Comprehensive Zoning Code. But the question then becomes, even though the defen-

dant is a church, does the restriction regarding dwellings, one-family detached apply. On that issue this Court would say that if it does not apply, then quite a few people in an effort to get around the restriction of dwelling, one-family detached, would quickly go out and start churches, then you can get around all the zoning ordinances otherwise applicable.

And the reading of the transcript in the District Court case indicates how relatively simple it is to establish a church. This Court holds that notwithstanding the fact that the defendant is a church, it must comply with the restriction on dwellings, one-family detached. And to define dwelling, one-family, detached according to the CZC, a dwelling,

one-family indicates a one-family dwelling as a building containing one dwelling unit. The family is defined to mean one or more persons all related by blood, adoption or marriage occupying a dwelling unit or lodging unit provided further that in lieu of the above family and domestic servants, no more than five unrelated persons may occupy a dwelling or a lodging unit. So it is the finding of this Court that church or not in this particular instance, the defendant must comply with the restriction contained in the zoning code which indicates that no more than five unrelated persons may occupy a dwelling or a lodging unit.

The motion for preliminary injunction asked that the Court restrain the defendants from using, maintain-

ing or occupying the property at Coelho Way in violation of the zoning code. That's broad. This Court will issue a preliminary injunction specifically restricting the defendants from violating the provision of the code which says no more than five unrelated persons may occupy a dwelling or lodging unit in which this requires there be only one dwelling unit on the property.

Now as far as the issue of res judicata, the Court rules it is not a bar to the Court's decision. Judge Kono's action was a criminal action and this action is a civil action. There are different issues, different considerations.

There have been raised issues considering double punishment. This Court holds that is not a bar to the Court's decision in this matter.

Issues raised concerning statutes of limitation applicability. This Court moves that it is not a bar to the Court's decision.

Concerning the necessity of establishing irreparable harm or the other normal requirements prior to issuing a preliminary injunction, it is this Court's decision as contended by the movant in this case, that as long as the plaintiff can establish a violation of the zoning code then the plaintiff is entitled to the injunction from that violation.

And in commentary whether or not it is the plaintiff's desire to really abate a nuisance, this Court makes no finding. It's not part of the issues in the case. All this Court knows is that the plaintiff had asked that the Court issue an injunction restraining

the defendants from violating the zoning code, things specifically with regard to the number of people who live within that premises on that property. And the Court finds that the plaintiff is entitled to an injunction as requested in that regard.

The Court makes no finding concerning any aspects of nuisance. It was not an issue raised in this case although it was talked about on many occasions.

And whether or not the Court's issuance of an injunction restricting the ability of defendant's people from occupying the residence will solve the problem of which the neighbors or the plaintiff complains, this Court can answer the question. It may not. But again that's not one of

the considerations before this Court.

Any questions?

* * *

APPENDIX "E"

IN THE DISTRICT COURT
OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

STATE OF HAWAII	) VIOL. SEC. 21-521
	) CZC
vs.	)
	) D.C. #1978-1406
INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,	)
Defendant.	)

TRANSCRIPT OF DECISION had in the above-entitled cause before the Honorable Russell K. Kono, District Judge, District Court of the First Circuit, Honolulu Division, State of Hawaii, on the 25th day of October, 1978.

APPEARANCES: ROLAND NIP
Deputy Prosecuting Attorney

JACK SCHWEIGERT
Attorney for Defendant

. . . . .

THE COURT: Well, the term "church" is used rather loosely in the ordinance. The dictionary definition of church apparently seems to say that the church is a place of worship of Christ.

At the same time, I don't know who prepared this ordinance. At the same time, I recall growing up in a community where my friends were referred to as going to church on Sunday, they would be talking about Buddhist church. They didn't say go to the temple, but church; so, I would have to interpret the term of church as any place in which people make any worship or practice their religious beliefs.

I think the term church is used on the broad sense in this particular

ordinance, so it would cover any or all types of religion.

Now, from the evidence, it is clear to this court that the defendants are engaged in a practice of a religious belief and that this is the kind of a religion where it is essential that the devotees live as close together as possible with the Guru in order to get that fullest benefit out of their religious beliefs.

Now, the ordinance provides that churches can be built or can be utilized in a residential district; and I believe that the defendants are using the premises located at 51 Coelho Way as a church within the meaning of the ordinance.

Therefore, the court will enter judgment of acquittal for the defendants.

I'd like to add in good faith or conscience, however, I think the basic problem here is not so much that you have so many people gathering on the premises, the problem is that the neighbors are complaining because of the noise, the sounds that are being emitted from the premises. While I believe in religious freedom, I believe to exercise the freedom, you have responsibilities and that responsibility is to see that your neighbors are not inconvenienced.

If there is any way that you could cut down the noise so that complaints can be eliminated, you won't have this problem.

MR. SCHWEIGERT: I can submit to the court, in response to that, that we are going to sound-proof the compound.

THE COURT: I think that's an excellent idea.

. . . . .

* * * * * *

CERTIFICATION

I hereby certify that the foregoing is a true and correct transcript of my original shorthand notes taken in the case of State of Hawaii versus INTERNATIONAL SOCIETY KRISHNA CONSCIOUSNESS before the Honorable Russell K. Kono, District Judge, District Court of the First Circuit, Honolulu Division, State of Hawaii, on the 25th day of October, 1978.

//s// DONNA M. JURICH
Donna M. Jurich
Court Reporter
District Court of the 1st Circuit
Honolulu Division
State of Hawaii
November 24, 1978

APPENDIX F

NO. 7350

IN THE SUPREME COURT
OF THE STATE OF HAWAII

OCTOBER TERM 1982

CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii,	CIVIL NO. 56267
Plaintiff-Appellee,	
vs.	
INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,	
Defendant-Appellant,	
and	
LLOYD FELL and JOHN DOES,	
Defendants.	

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed on February 1, 1983, the judgment of the lower court is affirmed.

DATED: Honolulu, Hawaii, March 21, 1983.

BY THE COURT:

//s// DARRELL M. PHILLIPS
Clerk

APPROVED:

//s// H. LUM
JUSTICE

FILED MARCH 21, 1983

APPENDIX G

NO. 7350

IN THE SUPREME COURT
OF THE STATE OF HAWAII

OCTOBER TERM 1982

CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii, Plaintiff-Appellee, vs. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, Defendant-Appellant, and LLOYD FELL and JOHN DOES, Defendants.	CIVIL NO. 56267

ORDER STAYING MANDATE

Upon consideration of the "Motion to Stay or Recall Mandate and/or Stay Judgment Pending Appeal" filed by Defendant-Appellant, to which there has been no statement in opposition by Plaintiff-Appellee after due notice thereof, and good cause appearing,

IT IS HEREBY ORDERED that this court's mandate in the above-entitled case shall be stayed pending disposition by the United States Supreme Court of an appeal or application for writ of certiorari to be filed in that Court by Defendant-Appellant; provided that the stay of mandate shall expire automotically if Defendant-Appellant fails to file such appeal or application within 90 days after the entry of judgment by this

court, said judgment being issued separately on this same day.

DATED: Honolulu, Hawaii, March 21, 1983.

BY THE COURT:

//s// H. Lum
Acting Chief Justice

FILED MARCH 21, 1983.

APPENDIX H

NO. 7350

IN THE SUPREME COURT
OF THE STATE OF HAWAII

OCTOBER TERM 1982

CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii,	CIVIL NO. 56267
Plaintiff-Appellee,	APPEAL FROM FIRST CIRCUIT COURT
vs.	HONORABLE JAMES S. BURNS, JUDGE
INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,	
Defendant-Appellant,	
and	
LLOYD FELL and JOHN DOES,	
Defendants.	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

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Attorney for Appellant

NO. 7350

IN THE SUPREME COURT
OF THE STATE OF HAWAII

OCTOBER TERM 1982

CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu, State of Hawaii,	CIVIL NO. 56267
Plaintiff-Appellee,	APPEAL FROM FIRST CIRCUIT COURT
vs.	HONORABLE JAMES S. BURNS, JUDGE
INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,	
Defendant-Appellant,	
and	
LLOYD FELL and JOHN DOES,	
Defendants.	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is given that ISKCON Hawaii, Inc., Defendant-Appellant, sued as International Society for Krishna Consciousness, hereby appeals to the Supreme Court of the United States from the Judgment on Appeal of the Supreme Court of the State of Hawaii, entered in this action on March 21, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: Honolulu, Hawaii, March 29, 1983.

//s// JACK F. SCHWEIGERT
JACK F. SCHWEIGERT
Attorney for Defendant-
Appellant

FILED MARCH 29, 1983

APPENDIX I

STATUTES, ORDINANCES, AND CONSTITUTIONAL AMENDMENTS

U. S. CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HAWAII REVISED STATUTES

Haw.Rev.Stat. §603-23

Injunction of violation of laws and ordinances. The circuit courts shall have power to enjoin or prohibit any violation of the laws of the State, or of the ordinances of the various counties; upon application of the attorney general, the director of the office of consumer protection, or the various county attorneys, corporation counsels, or prosecuting attorneys, even if a criminal penalty is provided for violation of the laws or ordinances. Nothing herein limits the powers elsewhere conferred on circuit courts.

Haw.Rev.Stat. §710-1077(1)(g) and (6)

Criminal contempt of court. (1) A person commits the offense of criminal contempt of court if: . . .

(g) He intentionally disobeys or resists the process, injunction, or other mandate of a court;

* * *

(6) Nothing in this section shall be construed to alter the court's power to punish civil contempt. When the contempt consists of the refusal to perform an act which the contmnor has the power to perform, he may be imprisoned until he has performed it. In such a case the act shall be

specified in the warrant of commitment. In any proceeding for review of the judgment or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment or order the commitment.

COMPREHENSIVE ZONING CODE

Revised Ordinances of Honolulu §21-106

Violations and Penalties.

(a) The City may maintain an action for an injunction to restrain any violation of the provisions of this Chapter and may take any other lawful action to prevent or remedy any violation.

(b) Any person violating any provision of this Chapter shall upon conviction, be punished by a fine not exceeding $1,000 or by imprisonment not exceeding thirty days, or by both such fine and imprisonment. The continuance of any such violation after conviction shall be deemed a new offense for each day of such continuance.

Revised Ordinances of Honolulu §21-110

Dwelling Unit. A 'dwelling unit' is a room or rooms connected together, constituting an independent housekeeping unit for a family, and containing a single kitchen.

Dwelling, One-Family. A 'one-family dwelling' is a building containing one dwelling unit. Mobile homes, travel trailers, housing mounted on self-propelling or drawn vehicles, tents or other forms of temporary or portable housing are not included within the definition.

* * *

Family. The term 'family' shall mean one or more persons, all related by blood, adoption, or marriage, occupying a dwelling unit or lodging unit, provided that domestic servants employed only on the premises, may be housed on the premises and included as part of the family, provided further, that in lieu of the above family and domestic servants no more than five unrelated persons may occupy a dwelling or lodging unit. With reference to domestic servant it is the intent of the Council that where one member of the family of domestic servants is employed full time as a domestic servant, such domestic servant's spouse need not be employed full time as a domestic servant for the same employer.

Revised Ordinances of Honolulu §21-500

A. R-1 Residential District.

Sec. 21-500. Legislative Intent.

The purpose of the R-1 Residential district is to provide areas for estate-type residential development.

These areas would normally be located in the suburban and rural areas away from concentrated urban development.

Revised Ordinances of Honolulu §21-501(a) and (b)

Use Regulations.

Within an R-1 Residential district, only the following uses and structures shall be permitted:

(a) Principal uses and structures:

(1) Agricultural and horticultural uses and structures; provided that uses and structures relating to the keeping of livestock, poultry or bees shall not be allowed, except as set forth in the provisions relating to accessory uses;

(2) Churches;

(3) Dwellings, one-family detached;

(4) Private non-illuminated golf courses, including par-3 but not miniature, with a minimum area of 10 acres, together with such uses which are incidental to golf courses, provided that such uses shall be designed and scaled to meet only the requirements of the members, guests or users of the golf course, and no signs or other indications of such uses shall be visible from any public way;

(5) Parks, playgrounds and community centers, botanical and zoological gardens and other public buildings and uses;

(6) Public elementary, intermediate and high schools and private schools having similar academic curriculums; colleges and universities, business colleges (but not trade schools); day nurseries in connection with public or private elementary schools or churches;

(7) Public utility installations and substations, excluding offices, provided that:

a. Utility substations, other than individual transformers, shall be surrounded by a wall, solid except for entrances and exits, or by a fence with a screening hedge; and

b. Transformer vaults for underground utilities and like uses shall be surrounded by a landscaped screening hedge, solid except for access opening.

(b) Accessory uses and structures. Uses and structures which are customarily accessory and clearly incidental and subordinate to principal uses and structures, including:

(1) Detached guest house and servants quarters on lots containing not less than 1/2 acre in area.

(2) Stables for horses, provided that no stable shall be within 300 feet of any property line.

(3) Roomers may be accessory to a family composed of persons related by blood, adoption, or marriage, provided that such roomers may not exceed a total of three persons.

Revised Ordinances of Honolulu §21-511

Use Regulations.

All of the uses and structures permitted in the R-1 Residential district shall be permitted in the R-2 Residential district, except that stables shall not be allowed, as an accessory use or otherwise.

Revised Ordinances of Honolulu §21-520

C. R-3 Residential District.

Legislative Intent.

The purpose of the R-3 Residential district is to provide areas for urban residential development, as contrasted with estate type development. To insure some privacy for those who may desire it, however, the minimum lot area requirement is set at 10,000 square feet.

Revised Ordinances of Honolulu §21-521

Use Regulations.

All of the uses and structures permitted in the R-2 Residential district shall be permitted in the R-3 Residential district, except that detached guest houses and servants quarters shall not be allowed, as an accessory use or otherwise.

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS,
Appellant,

v.

CHARLES F. MARSLAND, JR.,
in his capacity as
Prosecuting Attorney, City and
County of Honolulu,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

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SCHWEIGERT & ASSOCIATES
250 South Hotel Street
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Honolulu, Hawaii 96813
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Attorney for Appellant
ISKCON HAWAII, INC.

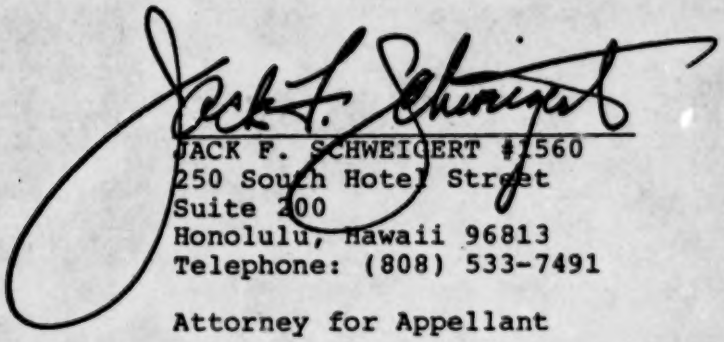
PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

I, JACK F. SCHWEIGERT, the attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of June, 1983, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On CHARLES MARSLAND, JR., as Prosecutor for the City and County of Honolulu, State of Hawaii, Appellee in this action, by leaving three copies thereof at his office at 1164 Bishop Street, Honolulu, Hawaii, 96813.

2. On TANY HONG, State Attorney General, who may chose to participate in this appeal on behalf of the State of Hawaii by delivering three copies

to his office at the State Capitol Building, Honolulu, Hawaii, 96813.



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Attorney for Appellant

NO. 82-2070

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,
Appellant,
v.
CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO AFFIRM OR DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ORDINANCES

NO. 82-2070

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS,

Appellant,

v.

CHARLES F. MARSLAND, JR., in his capacity as Prosecuting Attorney, City and County of Honolulu,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16(1) (b) and (d) of the Supreme Court of the United States, Appellee Charles F. Marsland, Jr., Prosecuting Attorney for the City and County of Honolulu, moves that the judgment below of the Hawaii Supreme Court be affirmed, or the appeal dismissed, because no substantial federal question is presented and the issue raised is of limited national importance.

STATEMENT OF THE CASE

Appellant's jurisdictional statement adequately depicts the case as it now stands.

ARGUMENT

1. The Question Presented is not Substantial Because the Ordinance Involved is a Reasonable Time, Place, and Manner Restriction.

This Court has long held as a general rule that a zoning regulation is not subject to constitutional attack unless it has no substantial relation to the public health, safety, and welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926); *Gorieb v. Fox*, 274 U.S. 603, 71 L.Ed. 1228, 47 S.Ct. 675 (1927); *Nectow v. Cambridge*, 277 U.S. 183, 72 L.Ed. 842, 48 S.Ct. 447 (1928). The policy behind the Court's deferential attitude was expressed in *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975), where it was said that:

> [z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

422 U.S. at 508 n.18.

In essence, Appellant claims that application of the "rule of five" (R.O.H. § 21-1.10) to the devotees residing in their church violates their First Amendment rights, since residence in groups of more than five is necessary to the practice of their religion; therefore, Appellant urges that judicial review of the ordinance as applied is proper here. Appellant supports its claim by reference to this Court's decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974),

arguing that a similar statute was upheld therein *only* because no fundamental right guaranteed by the Constitution was involved. (Jurisdictional Statement at 33.)

This Court has never held a statute unconstitutional merely because it involved a fundamental right. Zoning ordinances involving various fundamental rights have passed constitutional muster on numerous occasions. In *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), the Court considered an ordinance which excluded "adult" theatres from residential areas and regulated their proximity to certain other facilities in areas in which they were permitted. Recognizing that the First Amendment permits reasonable regulation of the time, place, and manner in which otherwise protected rights are exercised, the Court found that the mere fact that a municipality confines such establishments to certain specified commercial zones or requires that they be dispersed to a certain degree does not render such ordinances unconstitutional. 427 U.S. at 62-63. It was emphasized that regulation of First Amendment protected activity by a zoning ordinance which imposed only a minimal burden on that activity is not constitutionally infirm especially where the incidental burden imposed is justified by evidence that the protected activity leads to the deterioration of the surrounding neighborhood. *Id.* at 71-72; *id.* at 78 (Powell, J., concurring).

In *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 L.Ed. 2d 671, 101 S.Ct. 2176 (1981), this Court considered the constitutionality of a zoning ordinance which, unlike the regulation involved in *Young v. American Mini Theatres, supra*, flatly prohibited all live entertainment, a form of expression clearly protected under the First Amendment. Assessing the Borough's claim that the ordinance was a reasonable time, place, and manner restriction, the Court found that such restrictions are reasonable only if they serve significant state interests without foreclosing "adequate alternative channels of communication." 452 U.S. at 75-76. The Court quoted from its opinion in

Grayned v. City of Rockford, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972), wherein it was stated that:

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

408 U.S. at 116-17 (footnotes omitted). Employing this analysis, the Court overturned appellant's conviction, holding that the Borough had failed both to identify interests making it reasonable to exclude all commercial live entertainment, and to present evidence establishing that live entertainment was incompatible with permitted uses. 452 U.S. at 74-75.

This Court employed a similar analysis when the protected liberty involved in the government regulation was the free exercise of religion. In *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1939), the Court considered a state statute which required religious organizations to obtain a permit certifying them as bona fide religous causes in order to legally solicit funds. The Court found that the Free Exercise Clause

> embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. None would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of

> the guaranty. It is equally clear that a state may by general and nondiscriminatory legislation regulate the time, the place, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

310 U.S. at 303-04 (footnotes omitted). The Court concluded that conditioning appellants' right to solicit on obtaining a license from a state official empowered to decide whether or not the cause was, in fact, religious, despite the state's ample interest in protecting its citizens from fraudulent solicitation, was not a reasonable time, place, and manner restriction but rather an impermissible and undue burden on the free exercise of religion. 310 U.S. at 306-07.

This Court considered a statute regulating activities similar to those in *Cantwell*, in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 69 L.Ed.2d 298, 101 S. Ct. 2559 (1981). Under the rules of a public corporation operating Minnesota's state fair, any person, group, or firm desiring to sell, exhibit, or distribute printed or written material within the grounds during the fair were required to do so only from a fixed location. In order to determine whether the rule was a valid time, place, and manner restriction on ISKCON's religious practice of Sankirtan, the public solicitation of funds in conjunction with the sale and distribution of literature, the Court referred to *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976), wherein it was stated that "We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." 425 U.S. at 771.

The Court found that the state fair rule in *Heffron* qualified under the content neutral standard both because it applied

equally to all who sought similar privileges and because space was allocated on a first-come, first-served basis, thereby obviating the possibility of content based discrimination by fair officials. 452 U.S. at 648-49. The rule also met the alternate channels requirement since ISKCON was free to pursue its religious practices both outside the fairgrounds and within the grounds, albeit at a fixed location. Moreover, ISKCON members were entirely free under the rule to mingle with the crowd and orally propagate their views. *Id.*

Whether the rule served a significant governmental interest was by far the most important question for the Court in *Heffron*. The State argued that the rule was necessary to assure the orderly flow of the fairgoing crowd, which averaged far in excess of 100,000 people in each of the 12 days the fair was open. The Court found that the Minnesota Supreme Court's decision to invalidate the rule, while recognizing the State's interest in preventing disorder, erroneously turned on the State's interest in avoiding the minimal disruption which would result from allowing ISKCON to pursue its activities. *Id.* at 651-53. Since the rule could not meaningfully be applied to other groups asserting First Amendment rights if it could not be applied to ISKCON, the proper inquiry was whether the State had a sufficient interest in preventing the disorder which would result from allowing *all* such groups the same unfettered use of the fairgrounds which ISKCON sought. *Id.* Viewed in these terms, the Court found that the State's interest was sufficient to justify the burdens imposed by the time, place, and manner restriction on the exercise of protected rights. *Id.* at 654.

Considering a commune's freedom-of-association challenge to an ordinance similar to the one challenged here, the court in *Palo Alto Tenant's Union v. Morgan*, 321 F.Supp. 908 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973), found the commune "legally indistinguishable from such traditional living groups as *religious communities* and residence clubs. The right to form such groups may be constitutionally pro-

tected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not." *Id.* at 911-12 (emphasis supplied). The court placed emphasis on the fact that there was no evidence to indicate that the ordinance was devised or enforced so as to discriminate against any group because of its racial, religious or political characteristics and observed that it affected only two of the many zones into which the city was divided, leaving such groups free to reside in those areas allowing apartment houses and multiple family dwellings. *Id.* at 912. The court concluded that the ordinance did not impinge upon a fundamental interest in such a way as to require the municipality to demonstrate that the ordinance served a compelling state interest by the least restrictive alternative. *Id.*

State courts have reached results consistent with this reasoning. In *Diakonian Society v. City of Chicago Zoning Board*, 390 N.E. 2d 843, 845 (Ill.App.Ct. 1978), the court observed that "[b]ecause of the interests protected by the first amendment to the United States Constitution, the impact of zoning upon church property cannot be determined in accordance with the usual rules; however, there is no doubt that the location of church property can be regulated in a proper case." In *Association For Educational Development v. Hayward*, 533 S.W.2d 579 (Mo. 1976) *(en banc)*, the Supreme Court of Missouri considered a religious society's claim that denial of a permit to inhabit a house in a residential district zoned to permit single family dwellings, churches, convents, monasteries, rectories and parish houses violated its right to the free exercise of religion. The court found that even though a municipality may not constitutionally exclude churches from a residential district, it did not follow that a city could not validly enact a zoning ordinance which prohibits the occupancy of a house in a residential district by more than a specified number of persons, even though they be members of a religious society, if they do not come within one of the specified exceptions to the rule. *Id.* at 587-89.

The court below reached a similar decision in *State v. Maxwell*, 62 Haw. 556, 617 P.2d 816 (1980) (*per curiam*). Appellant there challenged on free exercise grounds her conviction for operating a hula studio in a residential district under a zoning ordinance which did not specifically permit such a use, claiming that her teachings were religious in nature. The court noted that while "church" use was not a "permitted" use in appellant's neighborhood,

> the prohibition is not absolute . . . . Ordinances which exclude religious uses from the territory of a municipality are of doubtful validity . . . . The total exclusion of places of worship is regarded not only as a regulation not within the scope of the police power, but also as one which infringes upon freedom of religion guaranteed by the constitution . . . .
>
> In this case, however, church use is a special use in appellant's neighborhood and may be applied for and granted upon approval of the commission.

62 Haw. at 561-62 (citations omitted).

The statute involved in the present case applies, on its face, to all who would occupy a one family dwelling regardless of their political, social or religious affiliation. Appellant made no showing that the "rule of five" was discriminatorily applied in this case, despite the claim of amicus in the court below that enforcement of the law had been selectively and arbitrarily "directed at one of the less popular religions in Hawaii." (Jurisdictional Statement at 28.) Not only was there no direct evidence of purposeful discrimination against Appellant, but there was no circumstantial evidence from which it could be inferred that other groups, religious or otherwise, had been spared prosecution.

The ordinance involved also provides ample alternatives for the exercise of Appellant's religious beliefs. Far from banishing Appellant from the confines of the city, as was the case in *Schad v. Borough of Mt. Ephraim, supra*, the challenged ordinance is narrowly tailored to permit Appellant to carry on its

activities in a wide range of districts. Under R.O.H. §21-5.2 (c) (7), Appellant may apply for a conditional use permit as a monastery or convent in any one of the city's seven residentially zoned areas (App. at 1-6).[1] Further, since it appears that it is not the particular structure which is occupied but the manner in which it is consecrated that makes the temple what it is, Appellant's needs could easily be accommodated by a multiple family dwelling which is a permitted use in the R-4, R-5, R-6, and R-7 Residential Districts as well as in all four of the districts zoned for apartments (App. at 5;6-8).[2]

Given the lack of discriminatory motive and the incidental impact resulting from the application of the "rule of five" to Appellant, it remains for this Court to determine whether or not the interests which the statute serves are sufficient to justify the restriction on Appellant's activities. Appellant urges that only a compelling interest will suffice to justify the burden imposed by the ordinance, but the cases it cites to support this

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[1] Appellant has not pursued this course, however, and there is no way of knowing what action would be taken if such application is made, particularly because the ordinance does not define monastery or convent. The constitutional issue that may arise in this context is therefore not ripe for consideration.

[2] The structure which Appellant now occupies was designed and built as a one family dwelling. Upon its donation, Appellant extensively remodeled the building to accommodate its needs. Under these circumstances, it is clear that it is neither the structure nor its location which are important to Appellant but rather it is the ability to carry on its activities wherever it may house itself. Appellee contends that Appellant should not be able to circumvent the law merely because it wishes to take advantage of a devotee's largesse, particularly where there is no showing that only on *this* parcel and in *this* structure will its members be able to freely exercise their religion.

contention are inapposite. Both *Sherbert v. Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790 (1963) and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 67 L.Ed.2d 624, 101 S.Ct. 1425 (1981), involved circumstances in which an individual was forced to choose between working and violating his religious beliefs or declining work inconsistent with his religious beliefs and foregoing government benefits. While in neither case was the individual compelled to violate his conscience, the burden on free exercise was substantial. *Sherbert, supra*, 374 U.S. at 403-04; *Thomas, supra*, 450 U.S. at 717-18. In *Wisconsin v. Yoder*, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972), the Court considered a statute which, though neutral on its face, compelled affirmative action (in violation of religious principles) by requiring an Amish student, who would otherwise pursue education after the age of 14 at home, to attend school until the age of 16. Because the coercion was direct and the infringement on free exercise rights substantial, the court found that "only those interests of the highest order" could justify the burden imposed by the statute. 406 U.S. at 215.

In the circumstances of the present case, Appellant is faced neither with a choice between religion and benefits otherwise available, as in *Sherbert* and *Thomas*, nor with a choice between religion and penal sanctions, as in *Yoder*. Here, the burden on Appellant's free exercise rights is neither direct nor substantial. The ordinance involved applies to Appellant, and to all others similarly situated, not because of its religious beliefs, but because of its choice of location. Further, Appellant's rights are burdened only to the extent that it chose to establish its temple in an area where such residential use is prohibited. Many other alternatives were open to it. Appellant would have this Court create a constitutional right, not previously recognized by this or any other court, to locate its facilities wherever it pleases.

This is not to suggest, however, that the enactment of zoning laws pursuant to the police power is unrestricted. To the contrary, where zoning laws affect the time, place, and manner in

which protected rights are exercised, they must serve a significant governmental interest. The interests asserted in the court below include freedom from the hazard of congested traffic and the attendant noise and air pollution, freedom to sleep through the night undisturbed by chanting and its musical accompaniment, and freedom from trespass and confrontation created by the coming and going of significant numbers of people. The desire to maintain placid areas within a metropolitan area was found to be a proper object of the police power in *Berman v. Parker*, 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954), wherein it was stated that:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

384 U.S. at 33. The city has a significant interest in preserving the character of its residential neighborhoods by the exclusion of incompatible uses while permitting and encouraging them in other districts. It is late in the day to complain that a zoning ordinance which imposes a reasonable time, place, and manner restriction on the exercise of protected freedoms is constitutionally impermissible.

2. *The case has no national significance.*

Despite the claim of amicus in the court below, Appellant has adduced no evidence to support the contention that the ordinance challenged here has ramifications not only for Hawaii's "traditional churches" but for the minority of religions whose practices resemble those of Appellant. Appellant has failed to show that either of these types of religious groups operate non-permitted residential facilities similar to those of Appellant, or that they have been or are subject to prosecution for violation of the "rule of five." While Appellant is surely correct that numerous municipalities across the nation have ordinances similar to the one challenged here, it has failed to

show that religious groups elsewhere operate similar facilities or that they have been or are subject to prosecution for violation of such ordinances. Under these circumstances, review by this Court would have minimal national impact.

CONCLUSION

Because the decision of the Hawaii Supreme Court is consistent with the views expressed by this Court the judgment should be affirmed, or the appeal dismissed, without further argument.

Dated at Honolulu, Hawaii: July 15, 1983.

Respectfully submitted,

CHARLES F. MARSLAND, JR.
Prosecuting Attorney

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Attorneys for Appellee

Appendix

APPENDIX

CONSTITUTIONAL PROVISIONS AND ORDINANCES

United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Revised Ordinances of Honolulu

COMPREHENSIVE ZONING CODE

ARTICLE I. GENERAL PROVISIONS.

§21-1.2. Legislative Intent.

This chapter is enacted to promote and protect the health, safety and general welfare of the people of the City and County. It is the intention of the City Council that the provisions of this chapter will implement the purpose and intent of the General Plan of the City by encouraging the most desirable use of land for residential, recreational, agricultural, commercial, industrial and other purposes, and the most desirable density of population in the several parts of the City, and by encouraging the most appropriate use and occupancy of buildings, and by promoting good civic design and arrangement. The provisions of this chapter provide reasonable standards with respect to the location, height, bulk, size of buildings and other structures, yard areas, courts, off-street parking facilities and other open spaces, density of population, and the use of buildings, structures, and land for trade, industry, business, residence, or other purposes.

§ 21-1.13. Application Procedures.

The application procedures specified in this section shall be followed in the administration of this chapter. Where more than one application would be required for a project, a single application shall be made addressing all issues required.

* * *

(c) Procedure C. Applications requiring the Director's public hearing.

(1) Applications following this procedure include:

* * *

(D) Conditional Use Permit.

(2) Application fees. An application fee of $100, plus $50 per acre or major fraction thereof up to a maximum of $1,000, shall be submitted with the application. Fees are not refundable.

(3) The completed application shall be filed with the Director. Upon such receipt, the Director shall:

(A) Submit a request in writing to the pertinent agencies and neighborhood boards for their comments and recommendations on the application. The agencies and boards shall within 45 days of receipt of request submit their comments and recommendations in writing to the Director.

(B) Hold a public hearing within the area no sooner than 45 days after acceptance of the completed application.

(4) Within 30 days after closing the public hearing, the Director shall:

(A) Approve as submitted;

(B) Approve with modifications and/or reasonable conditions; or

(C) Deny, with reasons for denial sent in writing to the applicant.

(5) Final action must be taken by the Director within 90 days from date of application.

ARTICLE 2. GENERAL REQUIREMENTS AND PROCEDURES APPLICABLE WITHIN VARIOUS DISTRICTS.

D. Conditional Uses and Structures.

§ 21-2.30. Application Requirements.

(a) Application for conditional use permit. A developer, owner or lessee (holding under a recorded lease the unexpired term of which is more than 5 years from date of filing of the application) may file with the Director of Land Utilization an application for a conditional use permit; provided that the conditional use sought is permitted in the particular district. The application shall be accompanied by a plan showing the actual dimensions and shape of the lot, the exact sizes and locations on the lot of existing and proposed buildings, if any, and the existing and proposed uses of structures and open areas; and by such additional information relating to topography, access, surrounding land uses and other matters as may reasonably be required by the Director in the circumstances of the case.

(b) Application procedure. The application shall be processed in accordance with Section 21-1.13 (c), Applications Requiring the Director's Public Hearing.

ARTICLE 5. RESIDENTIAL DISTRICTS.

A. R-1 Residential District.

§ 21-5.1. Legislative Intent.

The purpose of the R-1 Residential district is to provide areas for estate-type residential development. These areas would normally be located in the suburban and rural areas away from concentrated urban development.

§ *21-5.2. Use Regulations.*

Within an R-1 Residential district, only the following uses and structures shall be permitted.

(a) Principal uses and structures:

* * *

(2) Churches;

(3) Dwellings, one-family detached;

* * *

(c) Conditional uses and structures. Uses and structures hereinafter specified; subject to compliance with the provisions of part D of Article 2 hereof:

* * *

(7) Monasteries and convents;

B. R-2 Residential District.

§ *21-5.10. Legislative Intent.*

The purpose of the R-2 Residential district is similar to that of the R-1 Residential district. However, lots of a smaller size would be permitted in this district.

§ *21-5.11. Use Regulations.*

All of the uses and structures permitted in the R-1 Residential district shall be permitted in the R-2 Residential district except that stables shall not be allowed, as an accessory use or otherwise.

C. R-3 Residential District.

§ *21-5.20. Legislative Intent.*

The purpose of the R-3 Residential district is to provide areas for urban residential development, as contrasted with estate type development. To insure some privacy for those who may desire it, however, the minimum lot area requirement is set at 10,000 square feet.

§ *21-5.21. Use Regulations.*

All of the uses and structures permitted in the R-2 Residential district shall be permitted in the R-3 Residential district, except that detached guest houses and servants quarters shall not be allowed, as an accessory use or otherwise.

D. R-4 Residential District.

§ *21-5.30. Legislative Intent.*

The purpose of the R-4 Residential district is to provide areas for urban residential development on medium-sized lots. Some flexibility in housing types would be achieved by permitting duplex type facilities.

§ *21-5.31. Use Regulations.*

(a) In addition to the uses and structures permitted in the R-3 Residential district, duplex dwellings and two-family detached dwellings shall be permitted in the R-4 Residential district.

(b) Transitional uses and structures: Where an R-4 Residential district adjoins an apartment, hotel, business (excluding B-1 Neighborhood Business districts), or industrial district without an intervening street, alley or permanent open space over 25 feet in width and where lots separated by the district boundary have adjacent front yards, the first lot within the R-4 Residential district or 100 feet of such lot nearest the district boundary (whichever is less) may be used for:

(1) Multiple-family dwellings; subject, however, to the yard requirement of the district in which the zoning lot is located and all the other requirements of the A-1 Apartment district other than yard requirements.

E. R-5 Residential District.

§ *21-5.40. Legislative Intent.*

The purpose of the R-5 Residential district is to provide areas for concentrated urban residential development. Here

again some flexibility in housing types would be allowed by permitting duplex type facilities.

§ *21-5.41. Use Regulations.*

All of the uses and structures permitted in the R-4 Residential district shall be permitted in the R-5 Residential district.

F. R-6 Residential District.

§ *21-5.50. Legislative Intent.*

The purpose of the R-6 Residential district is to provide areas for concentrated urban residential development on minimum size lots. This would allow the development of property to maximum residential densities in areas where such intense development is desirable.

§ *21-5.51. Use Regulations.*

All of the uses and structures permitted in the R-5 Residential district shall be permitted in the R-6 Residential district.

G. R-7 Residential District.

§ *21-5.60. Legislative Intent.*

The creation of the R-7 Residential district is in recognition of the existence of areas developed with single-family dwellings on 3,500 square foot lots, some of which are within rehabilitation and conservation projects of the Honolulu Redevelopment Agency. This type of residential development is not considered desirable for the future and extensions, additions or new districts of this type are discouraged.

§ *21-5.61. Use Regulations.*

All of the uses and structures permitted in the R-6 Residential district shall be permitted in the R-7 Residential district.

ARTICLE 6. APARTMENT DISTRICTS.

A. A-1 Apartment District.

§ *21-6.1. Legislative Intent.*

The purpose of the A-1 Apartment district is to provide areas for multiple family use within a range of low to me-

dium land use intensities, and for non-residential uses which support or are compatible with the primary residential character. This district, permitting only low rise, low density apartment use, is compatible with adjacent single-family residential districts and is intended as a buffer between those districts and other denser and non-compatible districts. It is also a district which could be used in general application throughout the City and County.

§ *21-6.2. Use Regulations.*

Within an A-1 Apartment district, only the following uses and structures shall be permitted:

(a) Principal uses and structures:

* * *

(2) Multiple-family dwellings;

(3) Churches.

B. A-2 Apartment District.

§ *21-6.10. Legislative Intent.*

The purpose of the A-2 Apartment district is to provide areas for multiple-family and compatible non-residential uses of a medium land use intensity. It is intended that these areas be located where public facilities are adequate for this type of use and where medium density apartment development is desired but where a height limit for protection of views is deemed to be an important consideration.

§ *21-6.11. Use Regulations.*

Within an A-2 Apartment district, only the following uses and structures shall be permitted:

(a) Principal uses and structures:

(1) All of the principal uses and structures permitted in the A-1 Apartment district.

C. A-3 Apartment District.

§ *21-6.20. Legislative Intent.*

The purpose of the A-3 Apartment district is to provide areas for multiple-family and compatible non-residential uses of a medium land use intensity. It is intended that these areas be located where public facilities are adequate

for this type of development and where height of buildings is not an important criteria. Much of the multiple-family areas outside of the district of Honolulu may be designated for this classification. However, the designation of land within an A-3 Apartment district is intended to apply throughout the City and County.

§ *21-6.2. Use Regulations.*

All of the uses and structures permitted in an A-2 Apartment district shall be permitted in an A-3 Apartment district.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 1983, three (3) copies of the Motion to Affirm or Dismiss were delivered to John F. Schweigert, attorney of record for Appellant herein, at his office located at 250 South Hotel Street, 2nd Floor Auditorium, Honolulu, Hawaii, 96813.

Arthur E. Ross
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City and County of Honolulu
1164 Bishop Street
Honolulu, Hawaii 96813
Phone No.: (808) 527-6138
Attorney for Appellee

NO. 82-2070

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS,
Appellant,

v.

CHARLES F. MARSLAND, JR.,
in his capacity as
Prosecuting Attorney, City and
County of Honolulu,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

BRIEF OPPOSING MOTION TO AFFIRM OR DISMISS

JACK F. SCHWEIGERT
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Attorney for Appellant
ISKCON HAWAII, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF OPPOSING MOTION TO AFFIRM OR DISMISS

I. APPELLEE DID NOT ARGUE AND THE LOWER COURTS DID NOT FIND THE ZONING ORDINANCE TO BE A TIME, PLACE, AND MANNER RESTRICTION ON THE EXERCISE OF RELIGION.

Appellee (Prosecuting Attorney, City & County of Honolulu) has moved to affirm the decision of the Hawaii Supreme Court prohibiting the continued occupancy by more than five ISKCON church members of temple premises in the practice of their religion. The construction and application of the Honolulu zoning ordinance to regulate Appellant's religious practice and to effectively exclude it from a district where churches are permitted is said to constitute a permissible "time, place, and manner" restriction on the exercise of religion. According to

the Prosecuting Attorney, Appellant may be constitutionally required to relocate its temple to some other area of the county which may permit a religion such as Appellant's. (Motion to Affirm or Dismiss, page 8.)

These attempts to justify the ordinance as necessary and reasonable are raised for the first time on this appeal. Neither the trial court nor the Hawaii Supreme Court made any of the determinations concerning impact on religious freedom, necessity for regulation, or "narrow tailoring" of the ordinance, referred to in the cases cited by the Appellee. Nor could they have done so based upon the facts presented to them.[1] In-

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1. Appellee offers unsupported conclusions, contradicted by the testimony cited in the Jurisdic-

stead both courts accepted the argument made at pages 10 and 27 of Answering Brief of Plaintiff-Appellee to the Hawaii Supreme Court:

> 4. A mere showing of statutory violation entitled Plaintiff to equitable relief.

There is no evidence or findings by the lower courts of a "slight burden" on protected constitutional rights (Young v. American Mini Theatres, 427 U.S. 50 (1976) at 72, n.35), that there exist "adequate alternative channels of communication" (Young, supra at 75-6), that the ordinance is

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tional Statement, speculating about the impact on Appellant's exercise of religion. It also disregards testimony of Rev. Gene Bridges, a Unitarian minister, on the likely impact of the City's construction on other Hawaii religions. [Transcript of October 25, 1978, at 8-36.]

"narrowly tailored to further the State's legitimate interest" (Grayned v. City of Rockford, 408 U.S. 104 (1972) at 116-7 and Young, supra, at 56, n.12), or other facts that Appellee claims would justify a restriction on the exercise of constitutional rights. Rather, as noted in Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981):

> None of the justifications asserted in this court was articulated by the state courts and none of them withstands scrutiny. [452 U.S. at 72.]

II. THERE WAS NO EVIDENCE OR CONSIDERATION OF THE EXISTENCE OF CONSTITUTIONAL ALTERNATIVES FOR APPELLANT'S EXERCISE OF RELIGION.

Appellee argues for the first time on this appeal that constitutionally adequate alternatives are available for the exercise of Appellant's

religion: that Appellant may operate as a monastery in the present zoning district and that Appellant might be able to re-locate to other areas of the county.

The first point constitutes a grave misstatement of facts, while the second was never raised at all below.

Both the trial court and the Hawaii Supreme Court were well aware, from testimony and evidence before them (e.g., Plaintiff's Exhibits 1 and 4, Transcript of February 8, 1979, at 35-6 and Opening Brief of Defendant-Appellant at 12- 13), that Appellant had been denied any conditional use permit for its temple based upon a determination of zoning officials that Appellant was <u>not</u> classifiable

as a monastery.[2] Thus the lower courts did not rely on this "alternative channel" as justifying a restriction on First Amendment right.

Appellee also argues for the first time that it may be possible for Appellant to practice its religion in certain other zoning districts. But there is absolutely no evidence to show that Appellant would be permitted its religious exercise in such districts, the number and location of such districts within the county, or the State's necessity for restricting

---

2. Appellant was not a "monastery" because devotees did not lead a cloistered life, but had considerable contact with the lay community. (Plaintiff's Exhibit "4".) The lower courts thus construed and applied the ordinance to find that Appellant violated the "single family dwelling" provision of the zoning ordinance.

Appellant's church, but not other churches, to any alternative areas as might exist.

III. THERE IS NO BASIS IN THE DECISIONS AND EVIDENCE BELOW FOR THIS COURT TO MAKE THE ADDITIONAL FINDINGS AND CONCLUSIONS REQUESTED BY APPELLEE.

Appellee concludes at page 8 of its Motion to Affirm that:

> . . . [I]t remains for this Court to determine whether or not the interests which the statute serves are sufficient to justify the restriction on Appellant's activities.

While such a determination must ultimately be made by some court in order to protect vital constitutional rights, there is no basis for such a determination as urged by Appellee. As noted by Justice Blackmun in a concurring opinion in Schad v. Bor-

ough of Mt. Ephraim, 452 U.S. 61 (1981):

> In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn to further a sufficiently substantial governmental interest", ante at 68, the zoning authority must be prepared to articulate, and support a reasoned and significant basis for its decision. [452 U.S. at 77.]

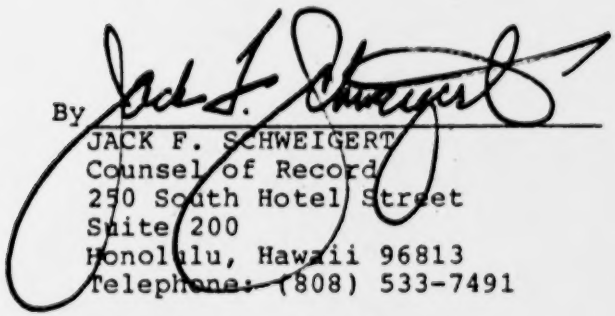
IV. CONCLUSION

The lower courts, at the request of Appellee, have adopted a construction of the ordinance which precludes a weighing of the impact on religious freedom and the sufficiency of any countervailing State interest. There is no evidence of the facts which the City agrees are necessary to constitutionally restrict First Amendment rights. Under these circumstances

the judgment upholding the constitutional validity of the ordinance should be reversed.

DATED: Honolulu, Hawaii, September 15, 1983.

Respectfully submitted,

By 

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NO. 82-2070

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS,
Appellant,

v.

CHARLES F. MARSLAND, JR.,
in his capacity as
Prosecuting Attorney, City and
County of Honolulu,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

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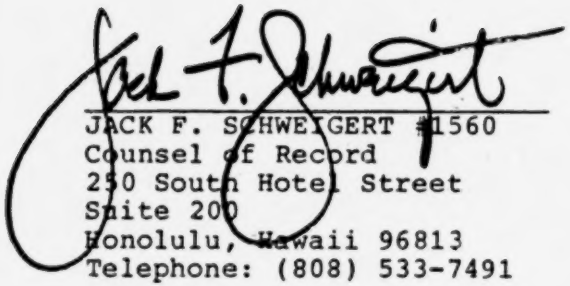
Attorney for Appellant
ISKCON HAWAII, INC.

PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

I, JACK F. SCHWEIGERT, the attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that all parties required to be served have been served and that on the 21st day of September, 1983, I served copies of the foregoing Brief Opposing Motion to Affirm or Dismiss on the parties as follows:

1. On CHARLES MARSLAND, JR., as Prosecutor for the City and County of Honolulu, State of Hawaii, Appellee in this action, by delivering three copies thereof at his office at 1164 Bishop Street, Honolulu, Hawaii, 96813, to an employee therein.



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